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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 1016

WILLIAM H. FRAZIER and CLARICE REED,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

CHARLES NORMAN SHAFFER,
342 Hungerford Drive,
Rockville, Maryland,
Attorney for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioners, William H. Frazier and Clarice Reed, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case September 2, 1966.

OPINIONS BELOW.

The United States District Court for the Middle District of Tennessee did not render an opinion. The opinion of the Court of Appeals is reported at 365 F. 2d 316.

JURISDICTION.

The judgment of the Court of Appeals affirming the conviction below was entered on September 2, 1966. An order denying petitioners' petition and supplemental petition for rehearing was entered on December 2, 1966. By order of Mr. Justice Potter Stewart, the time for filing a petition for a writ of certiorari was extended to and including February 1, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED.

Section 7201 of Title 26, United States Code, provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than five (5) years, or both, together with the costs of prosecution.

Section 2 of Title 18, United States Code, provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

QUESTIONS PRESENTED.

I.

Whether the Government may utilize a joint net worth and expenditures method of income reconstruction in a criminal tax fraud prosecution of two individuals—one charged as principal and the other as aider and abettor—to prove their joint net worth and expenditures, which attributes all of the alleged under-statement of income to the principal, where the record discloses that his co-defendant made all of the expenditures which the Government had relied upon to prove the alleged unreported income and that she herself had a likely source of unreported income for a substantial period of time both before and during the tax period in question?

II.

Whether two defendants may be convicted—one of the crime of income tax evasion, and the other of the aiding and abetting therein—upon the uncorroborated testimony of one witness whose prior sworn statements given to the government and whose tax returns are at essential variance with his testimony?

III.

May a defendant be convicted of aiding and abetting the crime of income tax evasion upon an indictment in each count charging that she "did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by . . . [the principal] to the United States of America . . . by filing and causing to be filed with the District Director of Internal Revenue . . . a false and fraudulent income tax return" where the record fails to disclose any evidence that she in any way participated in the preparation of filing of the returns in question?

STATEMENT.

On March 20, 1964, indictment was filed in the United States District Court for the Middle District of Tennessee, Nashville Division, charging the defendants, William H. Frazier and Clarice Reed, with violation of Title 26, United States Code, Section 7201, for attempting to evade and defeat a large part of the income tax due and owing by the said Frazier for the years 1958, 1959 and 1960, by filing and causing to be filed with the District Director of Internal Revenue false and fraudulent income tax returns of the said William H. Frazier for those years. Upon pleas of not guilty and after a bench trial, the defendants were convicted and found guilty as charged, the defendant Frazier being sentenced to five (5) years' imprisonment and a $6,000.00 fine and the defendant Reed to three (3) years' imprisonment.

The judgment of the Court of Appeals affirming the conviction below, was entered on September 2, 1966. An order denying petitioners' petition and supplemental petition for rehearing was entered on December 2, 1966. The mandate of the Court of Appeals having been stayed, the defendants remain released upon their bonds pending appeal.

The three count indictment charges that the defendants, William H. Frazier and Clarice Reed, for each of the taxable years 1958, 1959 and 1960, "did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by William H. Frazier to the United States of America . . . by filing and causing to be filed with the District Director of Internal Revenue . . . a false and fraudulent income tax return". The record discloses that the defendant Frazier for those years, did file federal income tax returns with the District Director of Internal Revenue at Nashville. In conformity

with a bill of particulars ordered by the Court, the Government, through stipulated proof and the testimony of witnesses, showed expenditures made by William H. Frazier and/or Clarice Reed, during the years at issue, in excess of the income reported by them individually and separately and attributed such excess to the defendant Frazier. The Government, in its brief to the Court of Appeals below, concedes that its reconstruction of the defendant Frazier's income by means of a joint net worth and expenditure method of income reconstruction, including therein the defendant Reed's assets and expenditures, is, in this instance, without precedent. Moreover, while the defendant Frazier had a likely source of cash income from his gambling activities during the net worth period, the record also discloses that the defendant Reed had access to substantial cash sums, through her operation of various retail liquor stores during the years 1948, 1949, 1950, and again from 1953 until her sale of the "Stockman's" liquor store in 1959, all tending to negate the inference that any unexplained joint net worth increase or expenditure during this period must be attributed to the defendant Frazier. In view of the fact that the instant case admittedly extends the use of the net worth method of proof beyond previously sanctioned limits, its use in securing the convictions below should be carefully scrutinized by this Court for the pitfalls against which it cautioned in **Holland v. United States**, 348 U. S. 121 (1954).

In connection with the second question presented, all of the foregoing statement is particularly relevant since Frazier's alleged understatement of income for the three years involved in the approximate amount of $70,000.00 is based upon two transactions.

One transaction in the amount of $60,000.00 relating to the alleged purchase of one-half (½) interest in the Park

View Motel in installments in 1958 and 1959 is solely dependent upon the testimony of the witness, Berryman, both as to its classification as an expenditure and its connection with the defendant Frazier.

This testimony from a witness of very doubtful credibility by reason of his previous record of felony convictions is materially at variance, not only with prior sworn statements given by him to the Government, but also with his income tax returns for the period in question, and a recorded deed contemporaneously executed showing the transfer of the one-half (½) interest to the defendant Reed was in consideration of Ten ($10.00) Dollars and the promise of personal services yet to be rendered rather than any substantial cash consideration.

The remaining alleged understatement of income by the defendant Frazier is more than accounted for by the second transaction consisting of a publicly recorded mortgage loan from the defendant Reed to one Hudgins in the amount of $12,000.00, which is not at all necessarily attributable to the defendant Frazier if cognizance is taken of the availability of unexplained funds to the defendant Reed.

The Court of Appeals below misplaced reliance upon **United States v. Johnson,** 319 U. S. 503 (1943), and answered the third question presented in the affirmative, which relates to the propriety of a defendant's conviction on a charge of attempted tax evasion **by filing and causing to be filed** upon a record devoid of any evidence connecting her with the preparation or filing of the tax returns in question.

It is respectfully submitted that the Court of Appeals in the instant case misread the **Johnson** case as precedent for the propriety of a **filing** charge upon facts of concealing, although the record in **Johnson** makes it clear that

the language charging the aiders and abettors in that case related to their acts of concealment and not to acts in any way related to the filing of the principal's returns.

The Court below in so holding is in apparent conflict with the Court of Appeals for the Fifth Circuit in two of its decisions rendered in the cases of **Vloutis v. United States**, 219 F. 2d 782, 790 (1955), and **Bentham v. United States**, 215 F. 2d 472, 473 (1954), both rendered subsequent to the decision in the **Johnson** case.

Respectfully submitted,

CHARLES NORMAN SHAFFER,
342 Hungerford Drive,
Rockville, Maryland,
Attorney for Petitioners.

APPENDIX "A".

No. 16642.

United States Court of Appeals
For the Sixth Circuit.

United States of America, Plaintiff-Appellee, v. William H. Frazier and Clarice Reed, Defendants-Appellants.	Appeal from United States District Court for the Middle District of Tennessee, Nashville Division.

Decided September 2, 1966.

Before WEICK, Chief Judge, CELEBREZZE, Circuit Judge, and GORDON, District Judge*.

PER CURIAM. Appellants, Frazier and Reed, were charged in a three-count indictment in the District Court with willfully and knowingly attempting to evade and defeat a large part of the income taxes due and owing by Frazier to the Government, for the calendar years 1958, 1959 and 1960, by filing false and fraudulent income tax returns in violation of Title 26, U. S. C. Section 7201, and Title 18, U. S. C., Section 2. They waived a jury and were tried and convicted on all three counts by the District Judge. Frazier was fined six thousand dollars and sentenced to five years' imprisonment. Miss Reed was sentenced to three years' imprisonment.

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* James F. Gordon, Judge of the United States District Court for the Western District of Kentucky, sitting by designation.

The Government's theory was that Frazier was the principal and Reed aided and abetted him in his income tax evasion by concealing assets which were acquired with his funds and taken in her name. Frazier had been in the gambling business. The Government's proof was by the net worth and expenditure method, which it claimed showed substantial understatements of income by Frazier for the taxable years in question, and disproved financial ability of Reed to acquire the concealed assets with her own funds.

The principal item in the Government's net worth computations was the acquisition by Reed from Robert A. Berryman of a one-fourth interest in the Parkview Restaurant and Motel, in 1958, and another one-fourth interest therein in 1959. In this manner she became an equal partner with Berryman. Berryman testified that the negotiations for the purchases were conducted by both Frazier and Reed, and the transfer of the interests was made for $30,000, paid in cash in 1958, and another $30,000 paid in cash in 1959. He testified that Frazier told him to put the property in Reed's name because the Government might "grab this money some time later."

Frazier denied that he purchased any interest in the Parkview property or used any of his funds for this purpose. Reed admitted that she acquired the one-half interest in the property but denied that she paid anything for it. She claimed that Berryman transferred the one-half interest in this valuable property to her in consideration for services to be rendered by her in managing the property and taking care of Berryman.

In 1960 Reed sold her one-half interest in the property in exchange for a $60,000-first mortgage thereon. The services which she rendered at the property extended over a period of only one and one-half years. In addition to receiving the $60,000-first mortgage, Reed made capital

withdrawals from the partnership of $2,400.00 in 1959 and $6,036.12 in 1960.

Appellants contended that Berryman had a criminal record and the trial court should not have believed his testimony. The fact is that Frazier also had a criminal record which would appear to be no less odious than Berryman's. They had been cellmates in the same penitentiary. Reed had made false statements in an application which she made for a license for the Ninth Avenue Liquor Store. The relationship between Frazier and Reed was close.

There was evidence to corroborate Berryman's testimony. Prior to the sale he was short of cash and had substantial bills outstanding. He paid those bills after the sales in 1958 and 1959. Furthermore, Reed sold her interest in the property for the $60,000-first mortgage, which is the amount Berryman testified she paid to him.

The trier of the facts apparently found much to be desired in the testimony of Frazier, Reed and Berryman, but it was his function to believe or disbelieve all or part of the testimony of any witness or party. He was in a much better position than we are, to pass upon the credibility of witnesses. In our judgment there was substantial evidence to sustain the convictions.

Reed further contends that she did not participate in the preparation or filing of any of Frazier's income tax returns; and that she did not aid and abet in their preparation or filing, and hence was not guilty of the charges contained in the indictment. But if the evidence is to be believed, she did aid and abet in the evasion of Frazier's income taxes by concealing his property. Criminality attaches for this conduct alone, and it was not necessary for the Government to prove that she had anything to do with the actual preparation or filing of the income tax returns. *United States v. Johnson,* 319 U. S. 503 (1943).

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1016

WILLIAM H. FRAZIER AND CLARICE REED,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On March 20, 1964, an indictment was returned in the United States District Court for the Middle District of Tennessee charging petitioner Frazier with attempting to evade and defeat income tax for the years 1958, 1959 and 1960 by filing false and fraudulent income tax returns for those years, in violation of Section 7201 of the Internal Revenue Code of 1954, and petitioner Reed with aiding and abetting

Frazier, in violation of 18 U.S.C. 2 (R. 8a-10a). The bill of particulars charged that Reed's participation consisted of her "permitting [Frazier] to hold assets and make expenditures in her name [and] by cooperating with him in the concealment of his ownership of assets held in her name" both during the tax years involved and during the investigation which followed (R. 15a). Trial by jury was waived. Both defendants were found guilty as charged. Frazier was fined $6,000 and sentenced to five years' imprisonment. Reed was sentenced to three years' imprisonment. (R. 16a-19a.) The court of appeals affirmed the convictions *per curiam* (Pet. App A). Further review is not warranted.

1. The government's case was tried on the net worth method. After the underlying evidence had been established by stipulation or proof, the government began its computations with the combined net worth of Frazier and Reed, who were shown to have had close business and personal relationships and to have commingled funds (R. 145b). The next step was to divide the total between Frazier and Reed—showing the net worth of each separately—on the basis of who had furnished the money for the acquisition of the assets (R. 147b). This showed that Frazier had understated his taxable income by more than $70,000 over the three-year period covered by the indictment. More than 80 percent of the unreported income was accounted for by one item, Frazier's investment in the Parkview Motel and Res-

taurant (see pp. 4-6, *infra*). It was also shown that during the prosecution years Frazier had had a lucrative source of unreported taxable income in the numbers business, which he conducted on a large scale (R. 26a-27a, 178a, 36b).

The government traced the financial and income tax return history of Frazier from 1939 through 1960 (R. 6b, 7b, 8b) and that of Reed from 1941 through 1960 (R. 13b, 20b, 21b, 73b, 149b), and established that the increase in net worth could not have stemmed from a prior accumulation of funds. The evidence showed that Frazier had been in jail continuously from April 1937 until December 1952, with the exception of about two months in late 1939 (R. 28a-29a); that he had never filed an income tax return until 1953 and that his return for that year had shown no taxable income (R. 158a); that his tax returns for 1955, 1956 and 1957 showed adjusted gross income of $500, $3,000 and $4,500, respectively (Govt. Ex. 7; R. 147a-148a); and that his net worth, $6,909 at the end of 1957, had increased to slightly more than $100,000 by the end of 1960 (R. 147b). Frazier declined to furnish the Treasury agents with any leads to sources of non-taxable income (R. 67b-68b). It was stipulated that he had never received any inheritance from any relatives (R. 139b).

The evidence of Reed's financial history showed that when she had been ill in 1941 her family had helped pay the bills (R. 10b-11b); that from 1941 to 1948 she had worked as a sales girl, never averaging

more than $35 per week (Govt. Ex. 13); and that from 1948 to 1957 she had made various small investments in homes and small businesses, all of which were carefully traced (R. 149b). All known nontaxable sources of income of Reed were taken into account in the computations. However, she was not given credit for a claimed cash hoard of some $32,000 —consisting of alleged gifts—to which she testified at the trial. This claim was inconsistent with pretrial admissions by her to the effect that she had never kept any large sum of cash on hand and that she was just a poor working girl. (R. 110a, 60b, 69b.)

The major controversy at the trial was over the inclusion in Frazier's net worth of an investment, made in the name of Reed, in the Parkview Motel and Restaurant. This was an enterprise started by one Berryman, who had invested a total of between $85,000 and $90,000 in it by 1958 (R. 67a-68a, 79a). Berryman testified that in 1958 he had discussed with Frazier and Reed a proposition that they buy a 25 percent interest in Parkview, and they had agreed to do so (R. 80a-81a); that Reed paid over to Berryman the first $30,000 payment in bills of ten, twenty and fifty-dollar denominations (R. 81a); that Frazier told Berryman that he could not put it in his own name because "[t]he government might grab this money some time later" and that it was agreed, therefore, that it would have to be put in Reed's name (R. 80a); that early in 1959 Frazier had told Berryman he wanted a 50 percent interest rather than 25 per-

cent and Berryman agreed to sell it for an additional $30,000; that $25,000 more was then turned over to Berryman in cash and the final $5,000 was paid in "dribbles" (R. 81a-82a); and that in April 1959 Frazier deeded a one-half interest in Parkview to Miss Reed (R. 82a). Frazier denied at the trial that he had ever invested any money in Parkview (R. 144a), and Reed denied paying Berryman anything except the $10 consideration recited in the deed (R. 169a). However, when the Frazier-Reed interest was transferred in 1960 to one Sheridan, in exchange for a $60,000 mortgage, Reed got the mortgage (R. 109b-110b). Her version was that this $60,000, plus $8,436.12 she had withdrawn from the business in the interim, represented payment for her services (R. 169a, 171a-172a, 110b). By her own testimony, however, her duties were never more than menial (R. 172a), and Berryman said that she kept the books and handled the money (R. 87a). Reed's version of the transaction—that she received over $60,000 for services rendered over a period of one and a half years at Parkview—is in sharp contrast to her testimony that she was a "sucker" to get involved in the first place (R. 170a).

2. Against this factual background, the contentions of petitioners are seen to be without substance. Berryman's testimony was not, as petitioners contend (Pet. 6), substantially at variance with his pre-trial statements. His testimony was in direct conflict with that of petitioners and thus presented the trier of fact with a pure question of credibility, which the

court resolved against petitioners. This determination was certainly not clearly erroneous. Petitioners' version was inherently incredible, and Berryman's testimony in its most important aspect—the alleged receipt of $60,000 from Reed—was corroborated by independent proof that in 1958 Berryman had no cash and was in debt but that by July 1959 the debts had been paid (R. 51a, 60a, 37b-41b, 41b-49b, 52b-56b). The fact that Miss Reed had made a will to take care of Frazier in the event of her death, but that Frazier had not reciprocated by making a will in her favor (R. 99b), gave further support to the inference that the disputed $60,000 came from Frazier.

Petitioners' remaining contention (Pet. 6-7)—that Miss Reed could not properly be convicted of aiding and abetting Frazier in evading his taxes by filing a false return because it was not shown that she had anything to do with the filing—rests on a misreading of the indictment. The allegation in the indictment relating to the filing of a false return is not properly to be read as spelling out the details of Reed's participation in the offense but merely as specifying the means by which Frazier committed the offense. The nature of Reed's participation is detailed in the bill of particulars, which alleges that it consisted in her "permitting [Frazier] to hold assets and make expenditures in her name [and] by cooperating with him in the concealment of his ownership of assets held in her name" both during the taxable years involved and during the investigation which

followed (R. 15a). The proscription in Section 7201 of the Internal Revenue Code of 1954 and its predecessors of wilful attempts to evade a tax "in any manner" is plainly broad enough to cover such conduct. *United States* v. *Johnson*, 319 U.S. 503, 518.[1]

There is no conflict between the case at bar and *Vloutis* v. *United States*, 219 F. 2d 782, 790 (C.A. 5), or *Bentham* v. *United States*, 215 F. 2d 472, 473 (C.A. 5). Those cases had nothing to do with aiding and abetting. They involved situations where husbands had been convicted of wilfully attempting to evade their wives' taxes by "filing and causing to be filed" false and fraudulent returns on behalf of the wives but it had not been shown that the husbands had had anything at all to do with the filing of the returns.

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[1] "* * * [A]s a matter of evidence as well as a matter of pleading, the court [below] was dominated by the notion that the co-defendants did not aid and abet Johnson if they actually did not share in the making of his false return on each March 15th. The nub of the matter is that *they aided and abetted if they consciously were parties to the concealment of his interest in these gambling clubs of which they themselves pretended to be proprietors.* Evidence of conduct, acts and admissions, amply warranted the trial court to send the substantive counts against the aiders and abettors to the jury." *United States* v. *Johnson, supra*, 319 U.S. at 518 (emphasis added).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

MARCH 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 247776 667